

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SEAN JERMAINE JONES,

Defendant-Appellant.

UNPUBLISHED
February 12, 2008

No. 275812
Genesee Circuit Court
LC No. 05-017356-FH

Before: Talbot, P.J., and Cavanagh and Zahra, JJ.

PER CURIAM.

Following pleas of guilty to six charges of breaking and entering a building with intent to commit larceny, MCL 750.110, defendant was sentenced to concurrent terms of five to 10 years in prison. His motion to correct an invalid sentence was denied. Defendant appeals by delayed leave granted from his sentences. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that the trial court erred in scoring 15 points for Prior Record Variable (PRV) 6 instead of 10 points. MCL 777.56 provides in pertinent part:

(1) Prior record variable 6 is relationship to the criminal justice system. Score prior record variable 6 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

* * *

(b) The offender is incarcerated in jail awaiting adjudication or sentencing on a conviction or probation violation..... 15 points

(c) The offender is on parole, probation, or delayed sentence status or on bond awaiting adjudication or sentencing for a felony..... 10 points

It is undisputed that defendant was not incarcerated awaiting adjudication on his probation violation at the time of the offense, but that he was so incarcerated at the time of sentencing. The trial court concluded that points for PRV 6 should be assessed based on the situation at the time of sentencing. This issue turns on construction of the statute, and review is therefore de novo. *People v Houston*, 473 Mich 399, 403; 702 NW2d 530 (2005).

The trial court erred by scoring PRV 6 at 15 points. The Sentencing Guidelines Manual is not controlling, but it states that the points are to be assessed “based on the offender’s relationship to the criminal justice system at the time the sentencing *offense* was committed.” Whereas MCL 777.56(1)(b) would require 15 points be scored when an offense is committed while incarcerated on a probation violation, MCL 777.56(1)(c) indicates that only 10 points should be scored when a defendant is on probation. When a defendant who is on probation commits the sentencing offense, the offense itself would constitute a probation violation. Since the guidelines apply only to felonies, and probation would presumably be revoked for a felony, the defendant would be incarcerated on a probation violation at the time of sentencing on the sentencing offense. Thus, *every* felony offender on probation at the time of the offense would be assessed 15 points. To make sense of both subsection (b) and subsection (c), we conclude that subsection (b) applies only when a defendant commits an offense while incarcerated on a probation violation, and that subsection (c) applies when the offense occurs while the defendant is merely on probation. Thus, PRV 6 should have been scored at ten points.

We also conclude that the scoring of Offense Variable (OV) 13, MCL 777.43, at ten points was error since the pattern of criminal activity involved three or more crimes against property only. There was no combination of crimes involving property, persons, or violations of drug laws. The prosecutor concedes that only five points should have been scored for OV 13. Given that subsection (b) of MCL 777.43 assigns the most points under OV 13 for a pattern of crimes against a person, and subsection (f) assigns the fewest points for a pattern of crimes against property only, we conclude that the Legislature did not intend to endow a judge with discretion to assign points under subsection (c), the combination subsection, where no combination exists.

The rescoring of the guidelines results in a recommended minimum range of zero to 17 months. MCL 777.65. Thus, the trial court must impose an intermediate sanction unless there are substantial and compelling reasons to sentence the defendant to imprisonment. MCL 769.34(4)(a). We note that the trial court initially departed upward from the erroneously scored guidelines. Defendant argues that the reasons for this departure were not substantial and compelling. However, reliance on the 60 breaking and enterings that were not charged as part of defendant’s plea bargain could be considered a substantial and compelling reason, *People v Armstrong*, 247 Mich App 423, 426; 636 NW2d 785 (2001), especially since the presentence investigation report indicates that defendant confessed to these crimes. These crimes were objective and verifiable, since they were external to the judge’s mind and were capable of being confirmed. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). Moreover, in referencing defendant’s probation and absconder status, it appears that the trial court was focusing on the relationship between defendant’s intransigent drug addiction and the failed probation and treatment options. There is no evidence that defendant’s pervasive drug addiction was taken into account by the guidelines. The trial court was not prohibited from considering this factor.

In general, “[a] defendant is entitled to be sentenced by a trial court on the basis of accurate information.” *People v Francisco*, 474 Mich 82, 88; 711 NW2d 44 (2006). However, an exception exists, precluding the necessity of resentencing, when a trial court has clearly indicated that it would have imposed the same sentence regardless of an error in scoring. *People*

v Mutchie, 468 Mich 50, 51; 658 NW2d 154 (2003). This exception, as recognized in *Mutchie*, is applicable in the circumstances of this case.

The trial court indicated at sentencing, using the erroneous scoring, that the recommended guidelines range of 10 to 24 months was too low and provided substantial and compelling reasons for its upward departure. The trial court also denied defendant's motion to correct an invalid sentence and affirmed the upward sentencing departure when presented with assertions of an error in scoring of the guidelines.¹ Given the trial court's clear and unequivocal statement that the higher guidelines range was too low, we may assume that the corrected guidelines range of 0 to 17 months would also be deemed inappropriately low by the trial court and it would still depart to the same extent as imposed at the initial sentencing. Consequently, we affirm defendant's sentence based on the trial court's express intent to impose the sentencing departure regardless of the guidelines range and its provision of substantial and compelling reasons for the departure. Since we have found that defendant is not entitled to resentencing, his request for reassignment of his case to a new judge on remand is rendered moot. *People v Cathey*, 261 Mich App 506, 510; 681 NW2d 661 (2004).

Affirmed.

/s/ Michael J. Talbot
/s/ Mark J. Cavanagh
/s/ Brian K. Zahra

¹ In his appellate brief, defendant implicitly acknowledges the trial court's intention to sentence him consistently, irrespective of the guidelines scores, when he cites to the trial court's reasoning at the motion to correct an invalid sentence. According to defendant, the trial court stated, in relevant part:

But in any event, the Court believes the guidelines do not account for somebody that's involved to this extent, that they don't [sic] generally don't have people up here on six felonies in the first place, much less sixty more uncharged felonies with serious addictions out of control. And the Court believes that the defendant demonstrated substantial and compelling reasons by this own behavior for departing from the guidelines. And so the Court believe [sic] that it would not be in a position to grant any motion to re-sentence or correct any sentence for the defendant.

We find this statement supports our determination that the trial court would impose the same sentence irrespective of the corrected guidelines range.